Tan Geok Lan (P) v La Kuan @ Lian Kuan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-32 OF 1997
ABDUL AZIZ JCA
30 NOVEMBER 2002

Civil Procedure *— Judgment — Consent judgment — Parties agreed to be bound by evidence of solicitor as regards issues in dispute — Whether parties were bound by agreement — Whether orders had to be made on the agreement — Whether High Court judge erred when she ruled that agreement did not bind parties because she had not made an order in terms of the agreement*

The first plaintiff ('the appellant') and the second plaintiff were the joint owners of a piece of land held under EMR 2155 for Lot No 1189 in the Mukim and District of Klang ('the said land'). On 17 December 1974, the plaintiffs entered into a joint venture agreement with the defendant ('respondent') whereby the respondent agreed to develop the said land into a housing estate. With the proposed housing project in mind, the appellant advanced payments in respect of conversion fee, drainage and irrigation fee, assessment and quit rent. However, the respondent failed to develop the said land. Later, upon termination of joint venture agreement by the plaintiffs and upon obtaining consent from the respondent, the said land was sold to a third party for RM550,000. After the sale, the plaintiffs sued the respondent for breach of contract. From the appeal record, it was noted that on 25 January 1996, counsel for the plaintiffs informed the High Court that the parties had reached a settlement. The terms of settlement was embodied in encl (37), which provided inter alia, that the parties had agreed to be bound by the statement of facts as deposed to by George Proctor, the solicitor acting for all parties in the sale and purchase of the said land and to enter judgment accordingly on the issues of whether: (a) payments for conversion fee, drainage and irrigation fee and quit rent had been reimbursed to the appellant from the sale proceeds of the said land; and (b) the appellant had at the time of the execution of the sale and purchase agreement in respect of the sale of the said land agreed with the respondent to accept her portion of the proceeds of sale, in full and final settlement of all claims. After encl (37) was tendered, the case was adjourned to 1 April 1996 to give time for George Proctor to file the affidavit referred to therein. On 18 March 1996, George Proctor affirmed an affidavit in which he answered the two questions in the negative. However, on 1 April 1996, a dispute arose as to whether encl (37) and the affidavit of George Proctor were binding on the parties. The case was further adjourned to 1 November 1996 for parties to make submissions. On 1 November 1996, after hearing submissions of both parties, the learned High Court judge made the following finding: '... Now, when encl (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date

to enable Mr G Proctor to file his affidavit. As such it is my considered opinion that there was no consent order made at all. Thus after hearing the submissions by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses ...'. This was the appellant's appeal. The second plaintiff was not a party to this appeal. The grounds of the appeal were essentially that the High Court judge had erred in departing from the consent judgment.

Held, allowing the appeal:

(1) The defendant's counsel did not object to the plaintiffs' counsel tendering encl (37) as a settlement between the parties. This meant that the defendant's counsel agreed that encl (37) constituted a settlement between the parties. Further, the trial judge had postponed the trial to enable George Proctor to file his affidavit. This act of the trial judge signified that the judge recognized encl (37) as an agreement between the parties. If the trial judge did not recognize encl (37) as an agreement between the parties, she would not have been willing to let George Proctor file his affidavit (see p 763E–G).

(2) The parties had agreed to be bound by the evidence of George Proctor as regards the two issues. Agreements between parties and manifested to the court pertaining to matters relevant to the case at hand were a common and essential feature of the conduct of civil litigation. Such agreements were good and should be encouraged because they expedited the disposal of cases. No orders need be made on them. The fact of the agreements was merely placed on record and the parties were bound by them. If any party wished to renege on such an agreement, or to vary any of its terms, he must (unless otherwise agreed by the other party), make a formal application supported by an affidavit setting out the facts that were relevant to the ground for the application (see pp 765I–766D), *Ng Kee Lin v Ooi Soon Eng* [1978] 2 MLJ 214 distinguished.

(3) Therefore, the High Court judge erred in principle when she ruled that the agreement did not bind the parties because she had not made an order in terms of the agreement. The High Court judge also erred in principle when she gave consideration to the unfairness to the defendant of the consequence of the agreement in deciding not to uphold the agreement. Accordingly, the appeal should be allowed (see pp 766D–E, 767G).

[Bahasa Malaysia summary

Plaintif pertama ('perayu') dan plaintif kedua merupakan pemunya bersama tanah yang dipegang di bawah EMR 2155 untuk Lot

No 1189 di dalam Mukim dan Daerah Klang ('tanah tersebut'). Pada 17 Disember 1974, plaintif-plaintif telah memasuki perjanjian usahasama dengan defendan ('responden') di mana responden telah bersetuju untuk memajukan tanah tersebut menjadi kawasan perumahan. Dengan memikirkan projek perumahan yang dicadangkan, perayu telah membayar untuk fee penukaran, fee saliran dan pengairan, taksiran dan cukai tanah. Walau bagaimanapun, responden gagal untuk memajukan tanah tersebut. Kemudiannya, setelah penamatan perjanjian usahasama oleh plaintif-plaintif dan setelah mendapatkan keizinan daripada responden, tanah tersebut telah dijual kepada parti ketiga untuk RM550,000. Selepas jualan tersebut, plaintif-plaintif telah mendakwa responden untuk perlanggaran perjanjian. Daripada rekod rayuan, telah diambil perhatian bahawa pada 25 Januari 1996, peguam untuk plaintif-plaintif memberitahu Mahkamah Tinggi bahawa parti-parti telah mencapai penyelesaian. Terma-terma penyelesaian telah terkandung di dalam kandungan (37) yang memperuntukkan, antara lain, bahawa parti-parti bersetuju terikat oleh pernyataan fakta seperti yang dideposkan oleh George Proctor peguam yang bertindak untuk semua parti-parti di dalam jualan dan belian tanah tersebut dan untuk memasukkan penghakiman untuk isu-isu sama ada: (a) fee penukaran, saliran dan pengairan dan cukai tanah telah dibayar balik kepada perayu daripada hasil jualan tanah tersebut; (b) perayu telah pada masa penyempurnaan perjanjian jual beli yang berkenaan jualan tanah tersebut bersetuju dengan responden untuk menerima bahagian hasil jualan beliau sebagai bayaran penuh dan muktamad semua tuntutan. Selepas kandungan (37) dikemukakan, kes telah ditangguhkan kepada 1 April 1996 untuk memberikan masa untuk George Proctor memfailkan afidavit yang dirujukkan di dalam. Pada 18 Mac 1996, George Proctor mengesahkan afidavit di mana beliau menjawab kedua-dua soalan secara negatif. Akan tetapi, pada 1 April 1996, satu pertikaian dibangkitkan sama ada kandungan (37) dan afidavit George Proctor mengikat parti-parti. Kes telah ditangguhkan selanjutnya ke 1 November 1996 untuk parti-parti membuat hujahan-hujahan. Pada 1 November 1996, selepas mendengar hujahan kedua-dua parti, hakim Mahkamah Tinggi yang arif membuat keputusan berikut: '... Now, when encl (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr G Proctor to file his affidavit. As such it is my considered opinion that there was no consent order made at all. Thus after hearing the submissions by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses ...'. Ini merupakan rayuan perayu. Plaintif kedua bukan merupakan parti kepada rayuan ini. Alasan-alasan rayuan adalah bahawa hakim Mahkamah Tinggi terkhilaf dengan tidak mengikut penghakiman persetujuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Peguam defendan tidak membangkang apabila peguam plaintif-plaintif mengemukakan kandungan (37) sebagai penyelesaian di antara parti-parti. Ini bermakna bahawa peguam defendan bersetuju bahawa kandungan (37) merupakan penyelesaian di antara parti-parti. Lagipun, hakim perbicaraan telah menundakan perbicaraan untuk membolehkan George Proctor memfailkan afidavit beliau. Tindakan hakim perbicaraan menunjukkan bahawa hakim perbicaraan telah mengesahkan kandungan (37) sebagai persetujuan di antara parti-parti. Jika hakim perbicaraan tidak mengesahkan kandungan (37) sebagai persetujuan di antara parti-parti, beliau tidak akan membenarkan George Proctor memfailkan afidavit beliau (lihat ms 763E–G).

(2) Parti-parti telah bersetuju diikat oleh keterangan George Proctor mengenai dua isu itu. Persetujuan di antara parti-parti dan telah dimanifeskan kepada mahkamah berkenaan perkara-perkara yang relevan kepada kes ini merupakan sifat yang biasa dan penting kepada pengendalian litigasi sivil. Persetujuan seperti itu adalah baik dan harus digalakkan kerana mereka mencepatkan penyelesaian kes-kes. Tiada perintah yang harus dibuat ke atasnya. Fakta persetujuan itu hanya diletakkan pada rekod dan parti-parti terikat olenya. Jika parti ingin memungkiri persetujuan itu, ataupun ingin meminda terma-termanya, beliau mesti (kecuali jika dipersetuju oleh parti yang lain), membuat permohonan yang formal yang disokong oleh afidavit yang mengemukakan fakta-fakta yang relevan kepada alasan permohonan itu (lihat ms 765I–766D), *Ng Kee Lin v Ooi Soon Eng* [1978] 2 MLJ 214 dibezakan.

(3) Oleh itu, hakim Mahkamah Tinggi terkhilaf dari sisi prinsip apabila beliau memutuskan bahawa persetujuan itu tidak mengikat parti-parti kerana beliau tidak membuat perintah seperti dipohon persetujuan itu. Hakim Mahkamah Tinggi juga terkhilaf di sisi prinsip apabila beliau menimbangkan ketidakadilan kepada defendan mengenai akibat persetujuan itu di dalam tidak mengesahkan persetujuan itu. Oleh itu, rayuan harus dibenarkan (lihat ms 766D–E, 767G).

[*Editorial Note*: This is the dissenting judgment of Abdul Aziz JCA. This dissenting judgment was received after the publication of the majority judgment by Mokhtar Sidin and Mohd Saari JJCA published in [2003] 3 MLJ 210.]

Notes

For cases on consent judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3183–3188.

Cases referred to

Ashmore v Corp of Lloyd's (No 1) [1992] 2 All ER 486 (refd)
Ng Kee Lin v Ooi Soon Eng [1978] 2 MLJ 214 (distd)

Appeal from: Suit No F 233 of 1983 (High Court, Kuala Lumpur)

MS Murthi (Murthi & Partners) for the appellant.
A Murali (K Kulasekar & Assoc) for the respondent.

Abdul Aziz JCA: The plaintiffs in the High Court, who were the joint registered owners of a certain land (EMR 2155 Lot 1189 Mukim and District of Klang), entered into a joint venture agreement with the defendant in the High Court, a developer, for the development of the plaintiffs' land into a housing estate. Alleging, inter alia, that the defendant had been in breach of contract in failing to complete the development within the agreed period, the plaintiffs brought an action against the defendant claiming, besides other reliefs, damages for breach of contract and interest on them, and special damages in the sum of RM47,366.60. That amount comprised sums that the plaintiffs claimed the first plaintiff had paid by way of conversion fees (RM17,408), drainage and irrigation fees (RM9,000), quit rent (RM8,694.60), and rates (RM12,264), which the plaintiffs claimed were the defendant's obligation under the agreement to pay but the first plaintiff had paid for the defendant as an advance, which she was now seeking reimbursement of.

According to the amended statement of claim, to mitigate losses the land had, by agreement of the plaintiffs and the defendant, been sold to a third party by a sale and purchase agreement dated 9 September 1988 for RM550,000, of which the first plaintiff's share amounted to RM225,000. The third party was Palm Grove Development Sdn Bhd.

The defendant in his statement of defence denied the plaintiffs' claim and pleaded frustration, besides other things.

On 25 January 1996, before the trial of the action commenced, the plaintiff's counsel, in the presence of the defendant's counsel, informed the court: 'Kami telah mencapai penyelesaian seperti di lampiran A'. The contents of lampiran A were as follows:

1 Mr George Proctor the Solicitor acting as Solicitor for all parties in the Sale and Purchase of the land under EMR 2155 Lot 1189 Mukim and District of Klang to Palm Grove Development Sdn Bhd is directed to file an affidavit to state.

(a) Whether or not the sum of RM17,408 for conversion fee, the sum of RM9,000 for Drainage and Irrigation fee, the sum, of RM8,694 for quit rent have been reimbursed to the first plaintiff from the proceeds of the sale received from Palm Grove Development Sdn Bhd.

(b) Whether or not the first plaintiff had at the time of the execution of the Sale and Purchase to Palm Grove Development Sdn Bhd of the land held under EMR 2155 Lot 1189 Mukim and District of Klang agreed with the defendant to accept her portion of the proceeds of sale, in full and final settlement of all claims against the defendant.

A

2 The parties have agreed to be bound by the statements of facts as deposed to by the said Solicitor George Proctor on the two issues as set out above and to enter judgment accordingly.

3 In the event the said Solicitor George Proctor fails neglects or refuses to affirm an affidavit as required by the consent order above, the parties shall be at liberty to issue a subpoena to compel the said solicitor to give

B evidence in open court.

At that stage, according to the aforesaid statement by the plaintiffs' counsel to the court, lampiran A constituted a settlement between the parties that was tendered to the court. According to lampiran A, there were two issues of fact between the parties and they had agreed that they would abide by the

C evidence of Mr Proctor, meaning they would accept whatever he might say about the two questions of fact to be true, that his evidence be solely by affidavit, and that the court direct him to file the affidavit. The two questions of fact were expressed by sub-paras (a) and (b) of para 1 of lampiran A and concerned the first plaintiff only. The answers to those questions were needed to ascertain whether, on the facts, the receipt by the first plaintiff of

D her share of the proceeds of sale of the land settled all her claims against the defendant, particularly the claim for reimbursement of the conversion fee, the drainage and irrigation fee and the quit rent. Apparently no dispute arose as regards the rates (RM12,264). If Mr Proctor answered the two questions of fact in the affirmative, the first plaintiff would fail in her claim. If Mr Proctor answered them in the negative, the first plaintiff would succeed.

E

The defendant's counsel did not object to the plaintiffs' counsel's tendering of lampiran A as a settlement between the parties. That in my view meant that he agreed that lampiran A constituted a settlement between the parties.

F The trial judge in fact postponed the trial to another date for mention to enable Mr Proctor to file his affidavit. That act of the trial judge, although it was not an express directive to Mr Proctor to file his affidavit, signified to me that the judge recognized lampiran A as an agreement between the parties that she then began to put into effect. If she had not recognized lampiran A as an agreement between the parties, the judge would not have

G been willing to let Mr Proctor file his affidavit.

Mr Proctor affirmed his affidavit on 18 March 1996. He answered the two questions of fact in the negative. I quote paras 4, 5 and 6 of his affidavit:

4 I confirm that the sum of RM17,408 being conversion fee, the sum of RM9,000 being Drainage and Irrigation fee and the sum of RM8,694

H being quit rent have not been reimbursed to the first plaintiff from the proceeds of Sale received from Palm Grove Development Sdn Bhd.

5 The first plaintiff when executing the Agreement dated 9 September 1988 with Palm Grove Development Sdn Bhd had at no time agreed to accept the proceeds of sale of the land held under EMR 2155 in full and final settlement of all claims against the defendant.

I

6 In fact vide an Agreement dated 9 September 1988 between the plaintiff [sic] and the defendant, it was the second plaintiff who had agreed at cl 1 thereof that out of the sum due to him from Palm Grove Development

Sdn Bhd a sum of RM137,500 could be deducted and paid to the defendant. At no time had the first plaintiff in any of those agreements agreed to waive her claim against the defendant for the Conversion Drainage and Irrigation fee etc.

On 1 April 1996, when Mr Proctor's affidavit was before the court, the defendant's counsel informed the court that he had only been served with the affidavit and he had not been able to get instructions from the defendant, whereupon the proceedings were postponed to the afternoon, when the defendant's counsel informed the court: 'In view of what has transpired I wish to consider whether I should discharge myself. I need one week to consider'. On 18 April 1996, the defendant's counsel having decided to discharge himself, and the defendant having agreed and the plaintiffs' counsel agreeing, the court allowed the discharge of the defendant's counsel (En Achan).

On 9 October 1996, the defendant being now represented by different solicitors and a different counsel (Mr A Murali), both parties agreed to proceed with submission on, to quote from the notes, 'sama ada persetujuan yang dicapai pada 25 Januari 1996 mengikat kedua-dua pihak'. To judge from what the plaintiffs' counsel informed the court, the need to determine that question arose because on 7 October 1996 the defendant's new solicitors had written to the plaintiffs' solicitors to say that the agreement entered into by counsel for both sides was ineffective in law and that therefore the defendant was not bound by it. The submission proceeded on 1 November 1996, and on 20 December 1996 the trial judge ruled that the agreement did not bind the parties and ordered the case to be tried on the oral evidence of witnesses. Hence the first plaintiff's appeal to this court.

I should mention that the agreement at lampiran A was not in the appeal record. The appellant's counsel explained to us that the only copy had been tendered to the court. It became encl (37), and I shall refer to it as such henceforth. It was, however, accepted that the contents of encl (37) were as set out at p 3 of the judgment. The same contents of encl (37) were set out in a letter dated 29 January 1996 from the plaintiffs' solicitors to Mr Proctor. There was, however, a difference in paragraph-numbering between the two texts, and because I prefer the paragraph-numbering of the text in that letter as being the correct one, the contents of encl (37) that I have set out is a quotation from that letter.

According to the notes, in the court below the defendant's counsel did not argue that encl (37) did not constitute an agreement between the parties beyond saying that there had been a miscommunication between his client and his client's former counsel. What the defendant's counsel did was to urge the court to use its discretion to order the case to proceed to trial notwithstanding the agreement because it would be unjust to the defendant not to be able to cross-examine the plaintiffs and their witnesses, including Mr Proctor. To fortify his plea, the defendant's counsel cited *Ashmore v Corp of Lloyd's (No 1)* [1992] 2 All ER 486 for the proposition that it is not for parties or their counsel to dictate to the court what evidence is to be adduced and what procedure is to be adopted, obviously taking the view that the agreement in encl (37) constituted such a dictating.

A When the judge ordered the action to proceed to trial, the reason she gave was that since the court had not made any order on encl (37) the parties were not bound by the agreement. In her written grounds for the appeal, she did say that as she had made no order on encl (37) there was no consent order but she did not say that for that reason the parties were not bound by the agreement. Instead she gave reasons that were in consonance B with the submission of the defendant's counsel. This was what she said:

> Now, when encl (37) was tendered to me on 25 January 1996, I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr G Proctor to file his affidavit. As such, it is my considered opinion that there was no consent order made at all. Thus, after hearing the C submission by both counsel on 1 November 1996, 1 made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses. I made the said ruling after scrutinising the terms of the proposed consent order. It was clear to me that by the terms of the said order the parties were endeavoring to dictate to this court on how it should conduct its proceedings. Furthermore it was also clear that Mr G Proctor's D affidavit favored the plaintiff s case. As such, to my mind, it would cause great injustice to the defendant if he were not allowed to cross-examine the first plaintiff and her witnesses, (if any). I adopt what was stated by the House of Lords in the *Ashmore* case:
>
> > 'The control of proceedings was always a matter for the trial judge and the parties are not entitled *as of right* to have their case tried to a E conclusion in such a manner as they thought fit ... A party's only legitimate expectation was that he would *receive justice*, which could only be achieved by assisting the judge and accepting his rulings.' (Emphasis added.)

I should mention that according to the notes the ruling was given on 20 December 1996 and not, as the judge said, on 27 November 1996. F

The judge did not appear to give any consideration to the explanation of the defendant's counsel that there had been a miscommunication between the defendant and his former counsel about encl (37), and to my mind rightly so, because there was no evidence before the judge as to the actual nature of the alleged miscommunication to enable her to conclude G that this was an exceptional case where an agreement made by counsel or solicitor ought not to bind the client. The defendant's counsel did cite *Ng Kee Lin v Ooi Soon Eng* [1978] 2 MLJ 214, but that was a case that concerned a consent order, namely an order of court made against a party with his consent on the application of the other party, as opposed to an agreement between parties as in this case, and, what is more important, it H was a decision on a formal application by the party against whom the order was made for a variation of the order on the around of mistake and therefore there were affidavits setting out facts relating to the alleged mistake to enable the court to decide that a variation was justified in law.

To me, it was obvious that this was not a case of a consent order but a I case of an agreement reached between the parties (or their counsel or solicitors) and manifested to the court as to the manner of resolving certain issues of fact that existed between them. They agreed to be bound by the

evidence of Mr Proctor as regards those facts, that is to say, to accept whatever he might affirm by affidavit about those facts to be true. Agreements between parties and manifested to the court are a common and essential feature of the conduct of civil litigation. Parties agree to all sorts of things about matters relevant to the case between them. They agree about documents. They agree about facts. They agree to limit issues and not to proceed on certain pleaded issues. They even agree to accept allegations of fact by the other side as true only for the particular case because they are confident of succeeding on the law in any case or because the law on the particular matter is such that it would make no difference what the actual facts were. Such agreements are good and are to be encouraged because they expedite the disposal of cases. No orders need be made on them. The fact of the agreements is merely placed on record in some way or other and the parties are bound by them. They have to be bound by them, even though the consequence of them may turn out to be unfavorable to one party, as otherwise they will mean nothing and will not serve their purpose. If any party wishes to resile from such an agreement or to vary any term of it he must, unless the other party agrees, make a formal application supported by an affidavit setting out the facts that are relevant to the ground for the application.

Holding those views, I was of opinion that the judge erred in principle when she ruled that the agreement did not bind the parties because she had not made an order in terms of the agreement. She also erred in principle when she gave consideration to the unfairness to the defendant of the consequence of the agreement in deciding not to uphold the agreement, particularly when the likelihood of the consequence could not but have been foreseen when the agreement was made.

As to *Ashmore*, the passage adopted by the judge was from the editorial summary of the House of Lords' decision and has to be understood in the context in which the relevant parts of original speeches were delivered. In that case the defendants (Lloyd's) applied for preliminary points of law to be argued and determined before hearing evidence, as, depending on the decision on the points of law, the scope of the necessary evidence might be reduced or the action could be decided without hearing evidence. The plaintiffs opposed the application. They wanted the case to go the standard way of hearing, evidence and submission on evidence and the law. The trial judge (Gatehouse J) allowed the defendants' application. The plaintiffs appealed to the Court of Appeal, who allowed the appeal. In the Court of Appeal, Ralph Gibson LJ, speaking of counsel for the plaintiffs, remarked at p 493:

> 'He claimed in particular that it was wrong thus to take the conduct of the proceedings out of the hands of the plaintiffs and thereby to disappoint the plaintiffs in their legitimate expectation that the trial would proceed to a conclusion upon the evidence to be adduced.'

The plaintiffs' stand was that it was their right to go the whole way in the conduct of their case notwithstanding that the prior determination of points of law might obviate or reduce the need for the adducing of evidence. Ralph

Gibson LJ agreed with the plaintiffs' stand. He thought that there was 'considerable force in those submissions' (p 493). To that, Lord Templeman, on the defendants' appeal to the House of Lords, said at p 493:

> My Lords, I disagree; the control of the proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings.

Earlier on, Lord Roskill in his speech had said, at p 488:

> The Court of Appeal appear to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. That was what Gatehouse J, in my view entirely correctly, sought to achieve by the order which he made, an order which as all your Lordships agree should be restored.

It is evident that the emphasis on the court, and not the plaintiff, being in control of the proceedings was made by the two Law Lords in the context of a dispute as to the most expeditious and inexpensive way of conducting the trial of an action so as to achieve justice, the plaintiffs insisting on the less expeditious and more expensive and time-consuming way. The dicta of the two Law Lords are not, in my opinion, appropriate to be used as authority for saying that where parties have agreed on an expeditious way of determining the dispute between them, they are dictating to the court about the manner of resolving the dispute and therefore the court may, for no better reason than that the manner chosen and agreed to will result adversely for one party, hold him not bound by the agreement.

For the reasons that I have set out, I was of the view that the appeal should be allowed.

It seemed to me from the notes of proceedings that before the trial judge the plaintiffs' counsel took the stand that the affidavit evidence of Mr Proctor entitled the first plaintiff (the appellant) to judgment for special damages and both the plaintiffs to general damages for breach of contract, the quantum to be assessed. In the written outline of submission of the appellant, it was prayed that the appeal be allowed and that judgment be entered in terms of prayers (e) and (f) in the amended statement of claim, which prayers were for special damages in the sum of RM47,366.60 and for interest on the sum. I missed the opportunity to ask the appellant's counsel about the position as regards general damages. Be that as it may, being of the view that the appeal should be allowed, I would give judgment for the appellant as sought in the outline of submission.

Before us, the defendant's (respondent's) counsel argued that the appeal had become academic because, in compliance with the decision and order of the trial judge, the trial had proceeded and, the defendant being absent, judgment in default had been entered against him. The appellant's counsel replied that the appellant would not feel safe with a judgment in default because the respondent might apply to set it aside.

I was of the view that in principle, and also on a consideration of costs, the appellant should be entitled to show, by having her appeal decided, that she was right in bringing, the appeal, although I also agreed that a judgment on the appeal would be more secure for her than a judgment in default.

Appeal allowed.

Reported by Lim Lee Na

End of Volume 3